1	IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA		
2	RICHMOND DIVISION		
3			
4	UNITED STATES OF AMERICA)		
5	v.) Criminal No.) 3:18CR18		
6	MOHAMED ABDELLAHI MOHAMED HORMA)) July 9, 2018		
7	Oury 9, 2016		
8			
9	COMPLETE TRANSCRIPT OF MOTION TO DISMISS		
10	BEFORE THE HONORABLE M. HANNAH LAUCK UNITED STATES DISTRICT JUDGE		
11	UNITED STATES DISTRICT GODGE		
12	APPEARANCES:		
13	Angela M. Miller, Assistant United States Attorney Office of the U.S. Attorney		
14	SunTrust Building 919 East Main Street, Suite 1900		
15	Richmond, Virginia 23219		
16	Counsel for the United States		
17	Robert J. Wagner, Assistant Federal Public Defender Office of the Federal Public Defender		
18	701 E. Broad Street, Suite 3600		
19	Richmond, Virginia 23219		
20	Counsel for the Defendant		
21	DIANE J. DAFFRON, RPR OFFICIAL COURT REPORTER		
22	UNITED STATES DISTRICT COURT		
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1	I N D E X	
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4	EXHIBITS	
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6	GOVERNMENT'S EXHIBITS	
7	Nos. 1A, 1B, 1C, 1D, 1E	23
8	No. 2, 3, 4, 5, and 6	23
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11	DEFENDANT'S EXHIBITS	
12	No. 1	2 4
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1 (The proceedings in this matter commenced at 2 2:09 p.m.) 3 THE CLERK: Case No. 3:18CR18, the United 4 States of America versus Mohamed Abdellahi Mohamed 5 6 Horma. 7 Ms. Angela Mastandrea Miller represents the United States. 8 9 Mr. Robert J. Wagner represent the defendant. 10 Are counsel ready to proceed? 11 MS. MILLER: The United States is ready, Your 12 Honor. 13 MR. WAGNER: Mr. Horma is ready. 14 THE COURT: First, I wish Mr. Camden well on 15 the addition to his family. 16 MR. WAGNER: Thank you, Your Honor. 17 THE COURT: Now, I understand we need to 18 re-arraign on the superseding indictment. Is that 19 correct? 20 MS. MILLER: That is correct, Your Honor. MR. WAGNER: Yes, ma'am. 21 22 THE COURT: Why don't we go ahead and do that 23 first. 24 MS. MILLER: If I may have just a moment, 25 Your Honor?

1 THE COURT: Of course.

2 MS. MILLER: Thank you.

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THE COURT: Uh-huh.

MS. MILLER: Good afternoon.

THE COURT: Good afternoon.

MS. MILLER: Mr. Mohamed Abdellahi Mohamed Horma has been charged in a superseding indictment.

The superseding indictment has the same exact charges as the original indictment, just some corrections that we made to it.

Count One charges that on or about

September 21, 2016, Mr. Horma, being illegally and
unlawfully in the United States, did knowingly and
unlawfully possess a firearm, to wit: A Smith &

Wesson 9mm handgun, in violation of Title 18, United

States Code, Section 922(g)(5)(A).

In Count Two, he's charged on or about

November 12, 2016, in the Eastern District of

Virginia, being an illegal alien, he did possess a

Ruger 9mm handgun in violation of Title 18, United

States Code, Section 922(g)(5)(A).

If convicted of either of those charges, he faces a penalty of up to 10 years incarceration, a \$250,000 fine, and three years of supervised release.

In Counts Three and Four, he's charged on or

about September 21, 2016, and on November 12 of 2016, after having been indicted for a crime punishable by a term of imprisonment exceeding one year, that is felony transport unstamped cigarettes, that he did willfully receive a firearm in Count Three, the Smith & Wesson just referred to, and in Count Four, the Ruger semiautomatic handgun just referred to, in violation of Title 18, United States Code, Section 922(n) and 924(a)(1)(D). If convicted, he faces up to five years incarceration, a \$250,000 fine, and three years of supervised release.

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In Count Three -- I'm sorry -- in Count Five, he's charged that on or about November 12 of 2016, he did aid and abet in the making of a false statement in the acquisition of a firearm, that is a firearm that was purchased at the War Store, and that is in violation of Title 18, United States Code, Section 922(a)(6) and (2). If convicted, he faces up to 10 years incarceration, a \$250,000 fine, and three years of supervised release.

There's also a forfeiture allegation that if he's convicted of the offenses alleged in Counts Two, Four, and Five of this indictment, that he would forfeit to the United States a Ruger 9mm firearm and all accompanying ammunition.

THE COURT: Are there also potential 1 2 immigration consequences? 3 MS. MILLER: There are, Your Honor. That is part of two of the counts, that he's here illegally in 4 5 the United States. So he would be subject to deportation as a result of the convictions, any of 6 7 these convictions. THE COURT: And it would affect his ability 8 9 to reenter the United States on a legal basis? 10 MS. MILLER: It would affect his ability to 11 pursue his asylum application that's pending, and it would also potentially affect his ability to reenter 12 13 the United States. 14 THE COURT: That's part of the maximum 15 possible penalties is what I'm asking. 16 MS. MILLER: Yes. 17 THE COURT: It's different for somebody who is a citizen and someone who is not. 18 19 MS. MILLER: That's correct. 20 THE COURT: All right. 21 MS. MILLER: Thank you. 22 THE COURT: All right. Mr. Wagner, is your 23 client prepared to be arraigned?

MR. WAGNER: He is, Your Honor.

THE COURT: All right. If you-all could

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stand just where you are. I think the translation is 1 2 more readily conducted there. We can arraign the 3 defendant. THE CLERK: Does the defendant waive formal 4 reading of the indictment? 5 6 MR. WAGNER: He does. 7 THE CLERK: Mohamed Abdellahi Mohamed Horma, 8 do you understand the charges against you in the 9 pending superseding indictment? 10 THE DEFENDANT: (Through an interpreter) 11 Yes. 12 THE CLERK: I ask you now, what is your plea 13 to Counts One through Five; quilty or not quilty? 14 THE DEFENDANT: (Through an interpreter) Not 15 guilty. 16 THE CLERK: Do you request a trial by jury or 17 a trial by the Court? 18 MR. WAGNER: Jury, please. 19 THE COURT: All right. You-all may have a 20 seat. 21 So we're here on the defendant's motion to 22

dismiss. And I'm going to ask you all if you have talked about how you want to proceed, including whether either side is planning on presenting any evidence.

MS. MILLER: Your Honor, we have discussed that, if I may approach. We were prepared to have an immigration officer testify, Officer Chin, today, but we have also spoken about an agreement of stipulations. So I'll orally put them on the record, and then if the Court would like me to file with the Court formal stipulations in the case so that the Court has it on the record, that would be fine as well.

But the parties are agreeing to stipulate that the defendant is a citizen of Mauritania. He came to the United States as an adult on a B1/B2 visa.

THE COURT: You're going to have to say capital or small whatever.

MS. MILLER: Capital B1 slash capital B2 visa. He arrived in the United States on December 29, 2013, and his visa expired on June 28, 2014.

In or about March of 2014, the defendant filed a petition for asylum. The petition, after going through the first round of analysis, was deemed not credible.

The defendant then filed, through his attorney, additional information asking for reconsideration. The petition was again reviewed and deemed not to be credible.

In 2016, the defendant was placed in removal 1 proceedings with his case referred to an immigration 2 3 judge. That matter was set for 2023. THE COURT: 2023, not 2021? 4 5 MS. MILLER: I may have made a typo in there. I'll go back and check. I have his immigration 6 7 paperwork. I thought it was 2023, but now that you 8 say that, I think it might be 2021. 9 THE COURT: The brief said 2021. 10 MS. MILLER: Is it 2021? 11 THE COURT: I don't know. That's what your 12 brief said. I don't have the documentation. 13 MS. MILLER: I do. I filed it with the 14 Court, but I have another copy of these materials for 15 the Court as a government exhibit. It's also been 16 provided to the defense, so --17 THE COURT: I'm sorry. When was that filed? 18 MS. MILLER: Maybe a month or two ago. 19 THE COURT: Okay. 20 MS. MILLER: I'm going to have to look through the A file, which I have with me, Your Honor. 21

through the A file, which I have with me, Your Honor.

It's not in the documents that I'm filing with the

Court that has the date of it. And then I'll clarify

for our argument. But it was sometime, you know,

several years from now that he was supposed to be in

front of the immigration court. And after he was brought here to federal court on the current charges, that date was moved to August of 2018.

The defendant was charged on July 13, 2016, in Howard County, Maryland, via an indictment with transporting cigarettes on which the tobacco tax had not been paid in violation of the Maryland Tax-General of the Annotated Code of Maryland, T-G 13-1015.

The indictment reads that this was contrary to the Act of the Assembly and made and provided, and against the peace, government, and dignity of the state.

MR. WAGNER: Judge, I think for purposes of stipulation, the indictment itself would speak to this. I don't know that we want to necessarily stipulate to what the indictment says. We didn't discuss this specifically, but I would just ask that the indictment be produced rather than having a stipulation as to what it says.

MS. MILLER: We'd be happy to do that, Your Honor.

MR. WAGNER: Thank you.

MS. MILLER: We'll provide it to the Court.

I will just tell the Court that Count Two in the indictment is a misdemeanor, and we're not alleging

1 that in the indictment here.

THE COURT: Just to be clear for the record, Count Two of the Maryland indictment is a misdemeanor.

MS. MILLER: We're talking about Count Two of the Maryland indictment. So, he's charged in a two-count indictment --

THE COURT: Right. I know. I'm just making clear for the record --

MS. MILLER: Yes, thank you.

THE COURT: -- because we have an indictment in front of us.

MS. MILLER: Yes.

The defendant was arraigned on the charges in early September 2016, and it was after that date that he's alleged to have received the firearms.

THE COURT: Can I ask you a question. Why are you guys not just putting the dates on the record?

MS. MILLER: What dates?

THE COURT: You're saying "early 2016, sometime in March."

MS. MILLER: Because I have -- I don't have the actual paperwork in front of me, but I have it in my file here. So I can do that. I didn't think I was going to have to put it on the record today. I thought I was going to have an agent testifying to the

complete file.

But I can tell the Court that he was stopped in Howard County, Maryland, on July 16th of 2016. He was indicted in the indictment that I just made reference to on July 27th of 2016. He appeared in court in Maryland in early September. I have the date in my file. I don't have the date in front of me. I believe it's September 2nd or 4th, but I want to clarify that for the Court.

THE COURT: I'm going to want written stipulations. This is a little mushy for me. One of the firearms is alleged to have been possessed in September of 2016. You're making it clear it was before the 21st. I understand what you're doing.

MS. MILLER: That's all, yes. That's all I'm saying.

THE COURT: It's just --

MS. MILLER: Prior to that date, yeah. We'll put the dates, the exact dates in the written stipulation to the Court, but we just want the Court to be aware at this point that it was, as the Court just said, prior to -- after indictment but prior to -- it's actually just after indictment and after he was aware that he was indicted. After his appearance in state court on that indictment he acquired the two

firearms.

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I'll tell the Court that I believe that the only other thing that we would stipulate and agree to is that on November 15th, he pled guilty to the felony charge in Maryland.

THE COURT: November 15 --

MS. MILLER: 2016.

THE COURT: And he was sentenced to 11 months imprisonment?

MS. MILLER: He was sentenced to 11 months with all the time suspended. He received a fine. And I can tell the Court the amount of the fine, but it was --

THE COURT: This is a little awkward; right?

I may have questions about some of this stuff.

MS. MILLER: I think we can agree to the answers to the Court's questions about it, though.

THE COURT: Yeah, but I'm not working from the stipulation that you've agreed to, and it's awkward to have stipulations only oral.

MS. MILLER: I understand.

THE COURT: I mean, obviously, this has been set for awhile; right?

MS. MILLER: Well, we're going to hand up to the Court today, while Mr. Wagner is arguing, we will

provide the Court with documentation for everything that I just said, because we have all of that today in the files here. So, we can certainly provide that to the Court, and we'll mark it as an exhibit. We'll put it all together. You'll have a copy of the indictment, a copy of the plea, a copy of the -- I could give you a copy of the transcripts of the plea hearing, and a copy of the transcript of his arraignment, and that would have all of these dates noted in that, and then it would be filed by --

THE COURT: So these exhibits that you have that you filed, are those exhibits that are before me for purposes of the motion to dismiss?

MS. MILLER: Yes, they are. We're entering them into evidence at this point as well. That's exhibits 1A, 1B --

THE COURT: All right. So, my clerk is telling me that the United States did not file anything in the CM/ECF, but that the defendant filed his A file. So whatever you're saying was filed about a month ago, I didn't remember seeing, but that doesn't mean -- I'm often wrong, but my clerk is almost never wrong, and she says --

MS. MILLER: I hand-delivered it to the Court. I didn't file it in the ECF filing system. I

filed it to the extent that I brought it to the Court so that the Court would have it in advance of the hearing, and I brought it -- and I provided it on the same day to the defendant.

THE COURT: So it's a courtesy copy, but it's not in the record.

MS. MILLER: That's right.

THE COURT: It's a courtesy copy of something that's not in the record.

MS. MILLER: And we have them marked and are asking to put them into the record, without objection by the defendant, the exact same documents which were marked for the Court when we hand-delivered them as 1A, B, C, and D, and it's just documents taken from the A file.

THE COURT: Did you deliver them to our chambers? We actually seem not to have gotten them.

MS. MILLER: Yes, we did deliver them to your chambers.

THE COURT: Well --

MS. MILLER: They are all documents that are also in the A file, Your Honor, that was filed by the defendant.

THE COURT: Apparently, all that was filed was the asylum application, not the A file.

MS. MILLER: Okay. I'm going to --

THE COURT: So we're going to take a recess.

I'd like you to be a little more specific about what exactly is in front of me or not. And you all can have agreed to it. And, obviously, there were papers delivered to us that we didn't get, which happens, but I want to make sure that I have them available to me and that I know the record we're dealing with before we go forward.

So we'll just take a few minutes. It sounds like it changed pretty soon to when I was about to take the bench. So we'll just give you the opportunity to be a little more direct, and so that I can be sure I have what I want also.

MS. MILLER: Sure.

THE COURT: All right. So we'll take a recess.

MS. MILLER: All right. Thank you.

(Recess taken.)

THE COURT: All right. So where do things stand?

MS. MILLER: So, we have a set of documents for the Court that defense and obviously I have, that we'll hand up, that go through all the dates that the Court was asking about and the documents that we were

referring to. So I think that would make things easier, hopefully. I will hand those up to Your Honor.

THE COURT: So, I'm just going to state, Ms.

Miller, I understand that what happened is there were

documents that were emailed to my clerk outside of the

normal process of submitting documents, and that's why

we weren't really aware of them. And I'm going to ask

that that process stop altogether.

MS. MILLER: Yes, that was just a courtesy copy in advance of the hearing. We were planning to introduce them at the hearing.

THE COURT: I think that what I said was if you're going to introduce proposed exhibits, there is a way to submit on CM/ECF what might be proposed exhibits. It wasn't a secret. I'm sure that the federal public defender was also notified.

But, for instance, you are handing me up exhibits now that have A numbers on them, which there's a process for redacting information from A files. And so I'm hoping that you all have considered how these are getting entered into the record.

MS. MILLER: Well, for the purpose of this hearing, we're going to provide them to the Court as exhibits as marked, and then we'll provide a second

set for the record, for the public record that will be redacted, but I think for the purpose of what we were going to do today, which was to put them in through an agent, we wanted to have the set unredacted so that the A file numbers and the dates of birth and all that would be available to the agent in case there was an issue about whether this was his A file or something like that.

So we will provide a set through the filing system, along with the stipulation, but they'll be redacted to have no personal identifiers included.

And there will, obviously, not be any references to his reasons for filing for asylum, because I think that was a concern as well. So we'll take that out. But we'll work together to do that at the end of the hearing or tomorrow and file that with the Court.

Then either later today or tomorrow, whenever we sit down, and make sure that we both agree to the redactions.

THE COURT: All right. Just give me a second, please, to look at these.

MS. MILLER: Sure.

THE COURT: So, in your briefing, you all referred to a specific date of application for asylum. Your stipulation that you said to me at the beginning

of this hearing did not specify -- well, I actually think they might have been inconsistent. And so I want to be sure that we address what that date is.

I certainly don't have a document that reflects that.

MS. MILLER: I think that we said -- I said aloud that it was March of 2014, but we are stipulating that in between the date of his arrival and the expiration of his B1/B2 visa that he applied for asylum.

I don't have his actual -- the actual date of when he stamped it and sent it in the mail. I would know when it was received but not when it was sent.

So I think in the defendant's position, he said sometime before the expiration.

THE COURT: Right. Somebody represented that it was February 13th, and I think that was in your briefing.

MS. MILLER: Okay. Then I took that from the file. But for purposes of the stipulation, we're just agreeing that it was before the B1/B2 visa expired that he filed his asylum.

THE COURT: What if I thought the date were important?

MS. MILLER: Well, if the Court thinks that,

we'll pull the file right now, and we'll tell you the exact date.

The issue that they brought up in their motion is that prior to the expiration. He doesn't say when.

 $\label{eq:continuous} \mbox{I'm trying to fill in the blanks for the} \\ \mbox{Court as best I can.}$

THE COURT: Both briefs refer to, or at least the government's brief, I can't remember now, about an application for work authorization that was approved.

Do you have a date for that?

MC MILLED The section of

MS. MILLER: It was not in my brief, Your Honor. I can look it up.

MR. WAGNER: Judge, I believe our opening brief speaks to his authorization.

THE COURT: Right.

MR. WAGNER: On page two.

THE COURT: On page two. It doesn't have a date.

MR. WAGNER: I'll try to get that for the Court.

MS. MILLER: So, I don't have the date that he applied for work authorization. Mr. Wagner said he'll get that for the Court. But he signed the application for asylum on February 4th of 2014, and it

was noted as having been received February 13th with an interview date -- February 13th of 2014 with an interview date of March 26th of 2014.

THE COURT: Well, the February date was one that was in the briefing. So I would prefer to have that document in the record.

MS. MILLER: Okay. His application for asylum was already filed with the Court under seal; is that right?

THE COURT: Apparently, the defense did that as part of their motion. But the issue is -- yes, but there's no date on it. We don't know what date it is.

MS. MILLER: Okay. So we'll get a copy made for the Court while we're going forward on the hearing so we don't have to take another break, so we can just move forward, but we're agreeing to that, and we'll provide the Court with those specific documents that will show that, those dates I just told the Court.

THE COURT: And we talked before we took a break about the date of the scheduled hearing. And is that in the documents you gave me, the 2021 versus 2023 date?

MS. MILLER: Yes. So it was March 2nd, 2021.

THE COURT: And which document is that in?

MS. MILLER: Hang on. Let me pull it up. I

think it was actually told to me by the defense. It
was told to me by the defense, and we would agree that
that was the date that he had that hearing originally
scheduled for.

THE COURT: So, I want some basis for that. So, the March 2nd, 2021, and the moving up date to August 8th.

MS. MILLER: August 3rd.

THE COURT: August 3rd.

MS. MILLER: I think there is a document in his A file that will show that, Your Honor, and we'll pull that from the file for the Court.

THE COURT: I'm sure there is also.

The date of the rebuttal submitted, that's not in here, right, for the denial?

MS. MILLER: Correct. That is something that the defense wants to introduce.

THE COURT: Okay.

MS. MILLER: Without objection, obviously. I asked if he wanted me to put it up, and he said that he would prefer to do it.

THE COURT: All right.

MS. MILLER: So may I go through for the record what's in the exhibits or does the Court not want me to do that? Just for the new items.

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THE COURT: I presume you're going to submit
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    a stipulation that covers it.
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             MS. MILLER: Okay.
             THE COURT: This has taken an hour.
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             MS. MILLER: I know. I understand.
                                                   Okay.
    will defer to Mr. Wagner since it's his motion.
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             THE COURT: So, I guess I'm noting for the
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    record that the government has submitted Exhibits 1A,
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    1B, 1C, 1D, 1E, Government's Exhibit 2, 3, 4, 5, 6,
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    all of which are submitted and made part of the record
11
    without objection. Is that correct, Mr. Wagner?
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             MR. WAGNER: Yes, Your Honor.
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             MS. MILLER: That's correct, Your Honor.
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             MR. WAGNER: Subject to redaction.
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             THE COURT: Yes.
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             (Government's Exhibits No. 1A, 1B, 1C, 1D,
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    1E, 2, 3, 4, 5, and 6 were admitted into evidence.)
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             MR. WAGNER: We have a single exhibit, a
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    rebuttal letter dated May 13, 2014, part of the A file
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    produced to the defense in discovery by the
    government, if I can submit that as Defense Exhibit 1.
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             THE COURT: Is it an exhibit to the
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    application that you submitted with your paper?
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             MR. WAGNER: I'm sorry?
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             THE COURT: The application for asylum?
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1 MR. WAGNER: Yes, I believe that's been 2 received by the Court.

THE COURT: Is that Exhibit 2 for purposes of today?

MR. WAGNER: For purposes of today, let's call it Exhibit 2. Thank you, Judge.

THE COURT: Well, yes. Okay.

(Defendant's Exhibits No. 1 and 2 are admitted into evidence.)

MR. WAGNER: Are you ready to hear the argument?

THE COURT: I am.

MR. WAGNER: Okay. Thank you for your patience, Your Honor.

THE COURT: Uh-huh.

MR. WAGNER: Judge, the issues before the Court have been fairly thoroughly briefed. So I will not be rehashing arguments that have previously been presented to the Court, but I do intend to discuss matters that provide some additional context and to touch on some points that I believe require some additional explanation. And also I wanted to be able to address any questions that the Court may have.

There are four issues, essentially, before the Court. The first issue is the question of Mr.

Horma's alleged illegal or lawful presence in the United States.

Second is whether the Second Amendment affords protection to Mr. Horma as to Counts Three and Four. That is conditioned upon the Court's finding regarding the first issue of whether he is here illegally or unlawfully. And then the second part of that second issue is whether 18 U.S.C. 922(n) is unconstitutional under the Second Amendment.

The third issue is whether the Maryland cigarette charge at issue qualifies as an exception under 921(a)(20)(A), the statute that exempts certain matters from prosecution under 18 U.S.C. 922(g) and (n).

And fourth is whether the residual clause of 921(a)(20)(A) is unconstitutionally vague in consideration of the holdings of *Johnson* and *Dimaya*.

So, turning to the first issue, Judge, unlawful, illegal presence in the United States. This comes up as the basis for the 922(g)(5)(A) charges, Counts One and Two. And as a determining factor in assessing Mr. Horma's basis to challenge the 922(n) statute under the Second Amendment, 922(g)(5)(A) provides that it shall be unlawful for any person, who, being an alien, is illegally or unlawfully in the

United States to possess a firearm.

The Fourth Circuit in Al Sabahi addressed a situation in which a visa to remain in the United States expired, but it did not address situations under which a person is applying for asylum, which is the case here.

Bazargan, an Eighth Circuit case --

THE COURT: None of those cases address an instance where somebody was in the country lawfully. All their reasons for being in the country lawfully had expired at the time that any action by them took place. I know that.

MR. WAGNER: That's exactly the distinction that we're trying to draw here. But what we're further saying is that Mr. Horma -- and I think this is uncontested -- that Mr. Horma has never been in the United States under a period of an unauthorized stay. His authorized period of stay never expired.

The government's admitted that in their pleadings. Document 22 at page 17, "A pending application for asylum does confer an authorized period of stay." Bottom of the page --

THE COURT: I know they admitted it.

MR. WAGNER: Okay. So the import of all this, Judge, can be found in 27 C.F.R. 471.11. It's

on page seven of the defendant's supplemental pleading.

This regulation states that "Aliens illegally or unlawfully in the United States include any alien who is a nonimmigrant and whose authorized period of stay has expired."

So it is uncontested that Mr. Horma's authorized period of stay never expired. So under this regulation, Judge, which has been cited by the Fourth Circuit in *Al Sabahi*, Mr. Horma has been in the United States legally and lawfully for all of the time that he has been here.

So, consequently, Counts One and Two should be dismissed as a matter of law.

THE COURT: Well, the United States cited the policy manual that indicates that in chapter three, part B, volume seven, that simply filing for an application for immigration benefit or having a pending benefit application generally does not put a foreign national into a lawful immigration status.

So tell me what deference I owe that and what I should do with their argument.

MR. WAGNER: Judge, we would suggest that no deference should be given to this particular regulation. Congress has not endorsed it under the

definition of being illegally or unlawfully in the United States.

THE COURT: There's no Chevron deference?

There's no deference?

MR. WAGNER: Perhaps some deference but certainly not to the extent that the government would submit to the Court. Any deference should certainly be overridden by the very statute that the Fourth Circuit has relied on in the *Al Sabahi* case, a case cited by the government.

THE COURT: But doesn't that same policy
manual say that those in a period of authorized stay
are protected from accruing unlawful presence? Do you
want me to disregard that also?

MR. WAGNER: Judge, unfortunately, I'm not aware of that particular provision from that regulation, but --

THE COURT: It's in the same policy manual that they cited.

MR. WAGNER: I understand, Judge. I was unaware of that particular provision in the manual. I don't believe it's been cited in the briefs, but I would certainly hope that the Court would look to that favorably on the defendant, and if the rule of lenity is to apply, then certainly that would weigh in favor

of the defendant in construing any competing regulations that the Court has reviewed.

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So, Judge, I think what the most important regulation that we have here is that cited by the Fourth Circuit in the *Al Sabahi* case which talks about an authorized period of stay in the United States.

And Mr. Horma was always in an authorized period of stay.

THE COURT: Well, that's the whole point; right?

MR. WAGNER: Yes, it is.

THE COURT: The whole point is, is an authorized stay lawful, unlawful or something else.

MR. WAGNER: And we would submit to the Court that it is lawful and legal, that if he was under a period of authorized stay, that he could not be punished under 922(g)(5)(A).

THE COURT: All right.

MR. WAGNER: So that leads to the second issue, Judge, and the second issue, frankly, the Court needs to determine initially whether or not Mr. Horma was in the United States illegally or unlawfully in order to find that he has the protection of the Second Amendment. The Carpio-Leon case clearly states this.

So we submit, though, even if the Court finds

that Mr. Horma was here illegally, a facial challenge to 922(n) is permitted by the Court.

THE COURT: Well, isn't it the case that the Fourth Circuit, and specifically a district court case here, and other Fourth Circuit cases, suggest that you shouldn't jump to the facial challenge before you decide the as-applied challenge, because if the as-applied challenge decides that the statute is unconstitutional, then when you're deciding facially whether no set of circumstances exist where the statute would be valid, you're done with the facial challenge. That's a decision by Judge Ellis in Masciandaro. Neither of you addressed which order to do it in, but the Fourth Circuit, and actually a challenge to an automatic rifle ban, says do the as-applied challenge first. Why wouldn't I do that?

MR. WAGNER: The as-applied challenge requires this Court to make certain factual determinations and those factual determinations --

THE COURT: Maybe that's why I'm asking about facts.

MR. WAGNER: Yes, Your Honor. But those factual determinations are what exactly I addressed in the first issue before the Court, whether Mr. Horma was here illegally or unlawfully. And, certainly,

once the Court makes that as-applied determination, the issue either goes forward under the Second Amendment if he was here legally or lawfully or doesn't go forward, but it seems to me, Judge, that if the Court is to hear the facial challenge, then it could not partake of the legal determination that the Court would make under the as-applied challenge.

But I understand what the Court is saying.

If the law is that the as-applied challenge needs to be made before the facial challenge is to be made, then, clearly, the procedure would be to determine whether or not he was here illegally or unlawfully.

THE COURT: So it's the Masciandaro case, and that was the right to carry a loaded firearm in a national park. That's a district court case published. There's a Fourth Circuit published case assessing the automatic rifle and large capacity ammunition ban in Maryland. And both of those cases suggest if it's the Fourth Circuit, does more than suggest you do as-applied first. So I am certainly inclined to follow that.

MR. WAGNER: Okay. In that case, Your Honor, we would suggest that the finding of whether Mr. Horma was here illegally or unlawfully should be in favor of the defendant, and that we've demonstrated that he was

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here legally and lawfully, and that will lead you to the resolution of the second issue in the case; the Second Amendment argument.

And I would ask the Court to turn to the Fourth Circuit decision in Kolbe v. Hogan. That decision starts out by talking about the parade of horribles and atrocities and mass shootings that assault weapons and large capacity magazines are responsible for, and this makes an empirical showing to the Court of the dangers of these types of weapons and how the Second Amendment does not protect the possession of these weapons. This was not a matter, the possession of or the ruling regarding assault weapons and large capacity magazines, it's not a matter of the Second Amendment's core protections.

So in the Second Amendment context, according to the Fourth Circuit in *Chester*, the government bears the burden of justifying the constitutional validity of the law that impacts Second Amendment rights. The government has failed to provide the Court with any empirical evidence to the Court to support its position under a heightened level of security to justify the statute of --

THE COURT: Why does a heightened level apply here?

MR. WAGNER: Well, we would suggest that a strict scrutiny standard should apply in this case,

Judge.

THE COURT: I thought that's what you mean

THE COURT: I thought that's what you meant by heightened. Sorry.

MR. WAGNER: Well, either the intermediate level or the strict level. The application of either of those standards the government still bears the burden of proof in demonstrating the justification for the challenged statute.

So the government has provided nothing to the Court, no statistics, no data, no anecdotal information, no empirical evidence suggesting that such a prohibition and such an infringement of constitutional rights is justified.

Now, the law allows persons who are under indictment to possess firearms.

THE COURT: Well, wait a minute. Under United States v. Carter, the Fourth Circuit held that the United States may resort to a wide range of sources, such as legislative texts and history, empirical evidence, which is what you're pointing to.

MR. WAGNER: Exactly.

THE COURT: Case law and common sense; correct?

MR. WAGNER: Yes, that is correct, Judge. 1 But there is no empirical evidence before the Court. 2 3 And in the absence of the empirical evidence, I believe that the Court needs to, well, look to common 4 5 sense, to look to cases, and to look to authority, and there's very little authority, very little information 6 7 before the Court to suggest what danger is posed by people who are under indictment receiving firearms. 8 9 They are permitted under the code to possess firearms. 10 Those who are released, those people under indictment, 1 1 and only those who are released by the court would be 12 subject to this prohibition, subject to the 13 prohibition of receiving firearms.

And so there's no information before the Court that those people who have been released by the court -- so there's allegedly been a determination of whether they pose a danger to the community, whether they are a risk of flight. And so there's already been some kind of narrowing of that class of people.

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The government has failed to demonstrate why those people by receiving firearms pose a danger or why those people should be restricted under this statute from receiving firearms.

THE COURT: Just to be clear, it's receipt or transfer; right?

1 MR. WAGNER: Yes, it is.

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THE COURT: The briefing kept saying receipt.

It's receipt or transfer.

MR. WAGNER: It is, Judge. But what we're dealing with here, certainly what Mr. Horma is charged with, is receipt.

THE COURT: Right, but it's a constitutional challenge.

MR. WAGNER: You're absolutely right.

THE COURT: Right.

MR. WAGNER: Under the Heller decision, under Chester, under Kolbe v. Hogan, the prohibition under 922(n) goes to the core protections of the Second Amendment. There's a two-step process that the Court needs to undergo. But 922(n) prohibits the arming, the receipt and transfer, of a person of any and all firearms in the defense of his home. Because this is an absolute prohibition, strict scrutiny should apply. But even with intermediate scrutiny, the government has failed to articulate a reasonable fit between the challenged regulation and the substantial government interest.

If this Court is true to Heller's dictates regarding the core protections of the Second

Amendment, then strict scrutiny would be the

appropriate standard, and the government would have to demonstrate that the challenged regulation was narrowly tailored to satisfy a compelling government interest.

So, based on this, the Court should find that 922(n) is unconstitutional under the Second Amendment.

THE COURT: So, what if I apply intermediate scrutiny? Why isn't it narrowly tailored because it's a limited period of time, because they can possess other guns, it's just an issue of somebody has found probable cause against somebody else, they're in the system, they're notified of a crime, and there's a moderate protection that they're not going to receive firearms during that time or transfer firearms, and why isn't that a reasonable fit?

MR. WAGNER: Judge, if some dangerous situation presents itself to someone who is under indictment, and they see the need to obtain a firearm in order to defend themselves, they are precluded from obtaining any firearm whatsoever. And so that, essentially, goes to the core protections of the Second Amendment as articulated in Heller.

They can't obtain a firearm. They can't obtain a firearm to protect themselves in their own home. And so under that scenario, we believe that a

strict scrutiny standard should be applied.

THE COURT: What if I applied intermediate?

MR. WAGNER: Yes.

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THE COURT: I'm asking you that different question. I know what you argued.

MR. WAGNER: All right. In that situation, there is no rational basis that the government -- excuse me.

THE COURT: Reasonable fit.

MR. WAGNER: Reasonable fit that the government can demonstrate for their governmental interest in the 922(n) statute.

THE COURT: So my question was, why isn't it -- if you have a congressional intent that says you've been convicted of a felony, and so everyone convicted of a felony can't have a gun, that's a governmental interest that derives in case law from public safety. And there's Fourth Circuit cases that say that.

MR. WAGNER: Of course.

THE COURT: So, if you then have a statute that says if you're under indictment for a felony while that's going on, while you are facing the possibility that you could lose your ability to possess any kind of firearm if you're convicted,

because that's the result of being convicted, why isn't it a reasonable fit to say all we're going to say is you're not convicted yet. You're only under indictment, but you can't get new weapons, and you can't transfer weapons. Why isn't that a lesser restriction that is tailored to a group of folks who are facing serious charges and know, as the government argued in its brief, and know that they could lose their right to hold weapons? Why isn't that a reasonable fit? And why doesn't the fact that there are two levels reflect congressional intent to that?

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MR. WAGNER: Our position here, Judge, is that if that person, that same person, has the right to possess the weapon, has the right to exercise that Second Amendment core protection to possess the weapon, to protect himself in his home, why is it that that person who never had a firearm to begin with should be precluded from obtaining a firearm, to exercise that same core Second Amendment right? It's simply -- there's no -- I don't believe there's a rational basis for it. I don't believe that the government can provide the rationale, the explanation, required to demonstrate why that distinction is necessary here.

There can be ways of tailoring that

application for a receipt of a weapon to the circumstances of the case to determine the dangerousness of the person, to determine whether or not a possession of a firearm for that person based on the circumstances.

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Take the Laurent case, Your Honor, from the New York District Court. That was a person who was charged with a robbery, charged with a violent crime. Very different than the situation we have here, a situation which involves an indictment for unstamped cigarettes in Maryland, a non-violent crime.

So at least there needs to be some provision in the law for some kind of evaluation of the danger that that person who may obtain that firearm, the danger that that person poses, Judge, and this would address the rationale that the government is required to provide under the Second Amendment.

THE COURT: All right.

MR. WAGNER: So this takes us then to the third issue before the Court, the willful transportation of unstamped cigarettes as a business practice violation under 921(a)(20)(A).

And this provision, 921(a)(20)(A), is an exception to 922(g). It's a situation which allows for someone who is in possession of a firearm, if they

had been convicted of certain offenses, to have an exemption to prosecution. And it also applies to someone who's under indictment.

So, 921(a)(20)(A) states that the term "crime punishable by imprisonment for a term exceeding one year" does not include antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.

Maryland's cigarette violations should be considered as a similar offense to antitrust violations, unfair trade practices, and restraints of trade. Untaxed cigarettes provide a competitive advantage, taking unfair advantage over retail sellers of cigarettes, a competitor. And it should be construed broadly, Judge. It should be construed as an economic regulation.

The language of the statute itself refers to "business regulation articles," which on its face suggest that it's related to the regulation of business practices as required by the statute.

But the analysis doesn't end there, Judge.

The Court must also consider the Constitutionality of the residual clause under *Johnson* and *Dimaya*. Johnson and *Dimaya* -- that turns to the fourth issue, Judge.

Johnson and Dimaya mark a new era in analyzing
residual clauses. 18 U.S.C. 924(e), the Johnson case,
and 18 U.S.C. 16(b), the Dimaya case, had been relied
on for years, but the U.S. Supreme Court through the
Johnson and Dimaya cases have changed that. Courts
must now consider the vagueness of residual clauses,
especially in criminal cases, with greater scrutiny
through the lens of Johnson and Dimaya.

All of the cases cited by the government in assessing the constitutionality of that residual clause came before *Johnson*.

THE COURT: What is the subsequent history?

MR. WAGNER: I'm sorry?

THE COURT: What's their subsequent history?

Does it indicate that Johnson abrogated them?

MR. WAGNER: I haven't seen any cases that have addressed that Judge, whether Johnson has abrogated those previous cases.

THE COURT: Well, are they reported as abrogated?

MR. WAGNER: I have not seen that, Judge, no.

THE COURT: They're not.

MR. WAGNER: So I understand the Court's concern there, but still, we do have the dissent from the *Stanko* case. Circuit Judge Bright actually made

the comparison in his dissent in that *Stanko* case between the residual clause in 921(a)(20)(A) and the residual clause in the Armed Career Offender Act, 924(e), which was the subject of *Johnson*.

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At page 420, he states, "But here the vagueness of statute goes beyond, for example, the uncertainty inherent in defining a 'violent felony' for purposes of 18 U.S.C. 924(e)(2)(B), codifying in part the Armed Career Criminal Act."

Circuit Judge Bright goes on to say that "924(a)(20)(A)'s exemption of similar offenses clause lacks the same specificity." And this was brought before the *Johnson* and *Dimaya* cases were ruled upon by the United States Supreme Court.

So, in light of *Johnson* and *Dimaya*, this gives more meaning to Circuit Judge Bright's dissent in *Stanko*, and we ask the Court to rely on that in finding that this provision, this residual clause in 921(a)(20)(A), is unconstitutional.

THE COURT: Would you concede, at least, that the Armed Career Criminal Act, the residual clause, addressed crimes that were different and far less dissimilar than those that are addressed in this clause that you challenge here? Unfair trade practices and the three examples that are listed here

are fairly similar in nature; correct?

MR. WAGNER: I would say that the list of crimes under ACCA is far broader than what we have here, but that doesn't necessarily mean a narrow interpretation of the residual clause is required here. I think certainly in light of Johnson and Dimaya, a much broader interpretation of that residual ——

THE COURT: Is it your contention that the taxing of cigarettes, directly or indirectly, has an economic effect?

MR. WAGNER: The taxing of cigarettes -THE COURT: Isn't it the case that the
similar offenses that are addressed here govern
behavior that affect consumers and competitors?
Correct?

MR. WAGNER: Yes, Your Honor, they do.

THE COURT: And to the extent that the clause that you challenge, it is not a direct effect on consumers and competitors. It's a tax law.

MR. WAGNER: Some of the cases that have been cited talk about an elements test and within the elements there must be some effect on competition, some effect on consumers, and I would concede that the elements of the Maryland statute do not have any

1 inquiry into competitiveness or consumers, but, 2 nonetheless, I think that a tax of cigarettes, an 3 unstamped cigarette law, necessarily impacts competition and --4 5

THE COURT: Indirectly.

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MR. WAGNER: Indirectly, yes. I think that's fair to say.

THE COURT: All right. Now, I'm going to ask you, Mr. Wagner, you rely heavily on Heller and its finding with respect to the Second Amendment right to possess weapons. What class of individuals does Heller apply to?

MR. WAGNER: A very broad class, Judge. Everyone who was impacted by the statute in Chicago. THE COURT: The language talks about

citizens.

MR. WAGNER: Okay.

THE COURT: Can you cite any part of Heller that says it applies to anything but citizens?

MR. WAGNER: I can't, Your Honor, but certainly when you look to the Fourth Circuit's treatment of the issue, they haven't simply narrowed that class to citizens.

I think even in Carpio-Leon, Judge Niemeyer talks about those who are here illegally not having

Second Amendment rights, but those who are noncitizens
aren't necessarily precluded from having Second
Amendment rights. As long as they are here lawfully,
they don't have to be citizens to enjoy the
protections of the Second Amendment. And that's a
fairly conservative application of the Second
Amendment by the Fourth Circuit.

So I don't think it's just restricted to citizens, Your Honor, the application of the Second Amendment.

THE COURT: Right. I asked about Heller.

MR. WAGNER: Right. But I'm just talking about Heller in the eyes of the Fourth Circuit and how they've construed Heller and how they've construed the Second Amendment after the decision in Heller.

THE COURT: Yes. All right. I think those are all the questions I have.

MR. WAGNER: Thank you.

THE COURT: Wait. Actually, I do have one more question.

MR. WAGNER: Sure.

THE COURT: I'm sorry. In your briefing, you turn a couple of times to arguments that suggest analogies to First Amendment assessments of the constitutionality of a statute. And I don't

understand why you would do that when the Fourth

Circuit has told me how to evaluate it. Can you tell

me why I would turn to that? There's a test in the

Fourth Circuit.

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MR. WAGNER: Right. I think that the reason we've relied on the First Amendment in our briefing, I would suggest, is because we want to show that strict scrutiny is the proper standard to apply.

In analyzing the Second Amendment issues to the First Amendment issues, we're trying to demonstrate that these core protections that are protected by both the Second Amendment and the First Amendment should be subjected to strict scrutiny analysis. So that's the principal reason for reciting the First Amendment cases.

THE COURT: All right.

MR. WAGNER: Thank you, Your Honor.

THE COURT: Thank you.

MS. MILLER: Your Honor, if I may begin with the issue of whether or not the defendant is in the United States lawfully, I think the seminal case that we look at here is *United States v. Al Sabahi*. And the court in *Al Sabahi*, the Fourth Circuit, recognized or noted that the federal regulations recognize that aliens illegally or unlawfully in the United States

include "nonimmigrants whose authorized period of stay has expired," and they cited to 27 C.F.R. 478.11 with approval.

What I wanted to also point out to the Court is the defendant in Al Sabahi argued that he was not illegally or unlawfully in the United States at the time he possessed the firearms, and it was after his visa expired. But in deciding Al Sabahi, the Fourth Circuit specifically referred to the Bazargan case in which that defendant had filed a petition for asylum.

THE COURT: After -- when he was already in the unlawful status.

MS. MILLER: No. No, that's not when it happened. The court referred back to the immigration judge's multipage finding. At first the court said we're not sure about that. But I have Bazargan here, Your Honor, and I did a little timeline on it because I think that it is important.

So what happened in *Bazargan*, if I can just take a moment and pull it out, is on October 7th of 1988, the defendant was admitted on a nonimmigrant student visa. He attends the University of Mississippi from October of '88 to December of '88. He then transfers to Jackson State University, and he did admit that he failed to follow the mandatory

transfer procedures, which would make the Court think
that he had already violated, and, therefore,
afterward applied for asylum, because in May of '89 is
when he applies for asylum, and that's when he also

But then in November of '89, he enrolls in Morehead State University, and he failed to follow the mandatory INS procedures for transfer. And then he's interviewed in January of '91. The guns are acquired in April of '91. I think maybe also in November. And then his asylum application is denied in May of '91. And the judge found that the defendant's status as a nonimmigrant alien ended in early 1990.

THE COURT: Which judge?

receives his employment authorization.

MS. MILLER: I'll tell you where that is. It says -- this is *Bazargan* at 848, Your Honor. I'll just read from the --

THE COURT: Just give me a second. I have it.

MS. MILLER: Sure.

THE COURT: All right. I see it.

MS. MILLER: So, in fact, the court found, We agree with the District Court that Bazargan's status as a nonimmigrant alien F1 student visa lawfully ended -- I'm sorry -- lawfully in the United States

terminated in early 1990.

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So, Bazargan, as I just noted for the Court, submits his application for asylum in May of '89. So his application for asylum was pending. And even though he technically violated, the court used the 1990 violation, not the prior violation, in holding that he was unlawfully in the United States.

But I would say to the Court even if he had applied for asylum after the date that his visa had expired, the court in Al Sabahi -- and no court, no court, has made a distinction between an application for asylum and an application for a change of status. There is not a single court that has found that a person applying for one versus the other is somehow different. And the Fourth Circuit in Al Sabahi cites to Bazargan. This is in Al Sabahi at -- it's at 309. I'm sorry. I might have missed that. No, it's at 309.

The court says after talking about the federal regulations and finding that 27 C.F.R. 478.11 is a regulation that recognizes that aliens illegally or unlawfully in the United States includes --

THE COURT: You're talking really fast and somebody is taking this down.

MS. MILLER: Yes. I apologize.

So what I'm talking about is in Al Sabahi, referring to Bazargan and other cases with approval, first the federal regulations are cited to, that you just asked about a moment ago, with approval. And then it cites a number of cases that say an application for a change of status does not change a person into a lawful -- lawfully here for purposes of 922(g)(1) or (5) or anything else.

It's also, I think, important that the Fourth Circuit in *United States v. Cavillo-Rojas*, which is an unpublished opinion but one that the court in *Al Sabahi* talks about, also found that the mere filing of an application for adjustment of status and receipt of an employment authorization card does not legalize an alien's presence in the United States and is still a crime under 922(g)(5) for the individual to possess a firearm. I don't know how it gets better than that.

THE COURT: So, why don't you speak to the policy manual that you cite.

MS. MILLER: Right. So, you're talking about 27 C.F.R. 478.11?

THE COURT: I'm talking about the United States Custom and Immigration Policy Manual that you cite, which cites the unlawful immigrant status at time of filing at INA 245(c)(2).

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MS. MILLER: All right. If I can have a
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    moment. I thought the Court was referring to my
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    reference to 478. Yes. So, it says -- well, first of
    all, the policy manual is not obviously binding on the
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    Court. The Fourth Circuit's decision in Al Sabahi is.
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             THE COURT: Then why did you raise it? So
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    what deference do I give it?
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             MS. MILLER: You know, some. The Court can
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    look at it and consider it.
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             THE COURT: Under the law.
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             MS. MILLER: Under the law, there's no
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    requirement that the Court --
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             THE COURT: There's no Chevron deference to
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    an agency that issues a policy manual. I know the
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    law.
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MS. MILLER: So, the Chevron deference to -there's Chevron deference, I believe, to a regulation
and a statutory provision when made in the exercise of
delegated authority. I'm not sure how much deference
the Court should give to a memorandum in a policy
manual, but we included it to be complete. But the
case of United States v. Atandi talks about Chevron
deference. And in terms of the ATF regulation under
--

THE COURT: Wait. I'm not talking about

that.

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2 MS. MILLER: Okay.

THE COURT: I know that --

MS. MILLER: So it's not --

THE COURT: Please don't talk over me.

MS. MILLER: I apologize.

THE COURT: I'm aware that the ATF regulation is not given the same amount of deference.

MS. MILLER: Right.

THE COURT: But certainly the Supreme Court has spoken to whether or not interpretations contained in policy statements, agency manuals, and enforcement guidelines do not warrant the level of Chevron deference that is generally accorded, but the Fourth Circuit may have addressed that issue about whether or not an agency's statement can be entitled to respect to the extent that the interpretations have the power to persuade; is that right?

MS. MILLER: I'm not sure. I would assume that that's correct. Your Honor, I'm not really sure that I have any kind of information in front of me that could say what the level of consideration the Court could give to that field manual. But the only point I was making was that although a pending application for asylum does confer an authorized

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period of stay, it does not extend an alien's lawful immigration status or cure his unlawfully status.

THE COURT: The reason -- obviously, I'm going to ask you the same question I asked Mr. Wagner, which is, in note 17 of the policy manual, it says that simply filing for an application for immigration benefit or having a pending application generally doesn't put a foreign national into lawful immigration status, which is what you're citing, but note 17 also says, "However, those in a period of authorized stay are protected from accruing unlawful presence."

MS. MILLER: And I think there they're talking about temporary protected status, TPS.

They're not talking about an asylum applicant or a person who has applied for an adjustment of status.

THE COURT: But he's an asylum applicant.

MS. MILLER: Right, but that's not -- an asylum applicant and someone who's been granted temporary protected status is very different. In other words, the granting of a temporary protected status would prevent somebody from being required to leave.

THE COURT: Are you denying that he was in a period of authorized stay?

MS. MILLER: I am saying that he was allowed

to remain, of course. While his asylum petition was

pending, he was allowed to remain. So, to that

extent, if the Court wants to say "authorized period

of stay," he is allowed to remain. And as cases have

said, permitting someone or allowing them to remain is

quite different than conferring lawful status on an

individual.

THE COURT: Well, the issue, though, is are they unlawful; right?

MS. MILLER: Right. So our argument based on Al Sabahi and the other 14 cases that have addressed this all say he is unlawfully here for purposes of 922(g)(5)(A). And that's the case in Latu, a Ninth Circuit case, decided in 2006, footnote 3; Bazargan that we talked about; Igbatayo; Elrawy, a Fifth Circuit case from 2006; Ochoa-Colchado.

THE COURT: So, let me ask you the question, presuming your interpretation of *Bazargan* is correct, why doesn't it make a difference? Because if you're interpretation is correct --

MS. MILLER: Sure.

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THE COURT: -- that's the one case where somebody was not an overstay or some other identifiably unlawful status. Why doesn't that make a difference?

MS. MILLER: So, you're asking me if *Bazargan* wasn't?

THE COURT: I'm asking you hypothetically.

MS. MILLER: Okay.

THE COURT: So, presuming you're saying there are 14 cases that have found this. So, I think if there are, really the major ones that have been addressed, all of them are in overstay. And I'll reread Bazargan. I see what you said. The issue, of course, is he admitted twice violating the terms before the time of the application being heard. But independent of that, I'll reread the case.

Why wouldn't it matter if you have the circumstance we have here? Which is Mr. Horma is here on a valid visa. Within the time period of the visa, actually months before it expires, he seeks asylum. As part of the asylum process, there are regulations that require that while it's under review, if you leave, you're considered to have abandoned your asylum application. You agree that's part of the process; right?

MS. MILLER: No, not exactly. If he leaves and goes back to his home country, he will have abandoned his asylum application, but if he applies for permission to travel, he can do that, and I don't

think there's anything that firmly says that he forfeits it. I think what he does is he loses his place in line, because when he comes back, and if he came back under --

THE COURT: Pretend I think that's what the regulation says. Pretend I think that if you leave, you're considered to have abandoned your asylum.

MS. MILLER: Okay. Then he would come back. Are you saying come back? No.

THE COURT: No. I'm saying he's here. And part of the reason he's here is because if he leaves -- even if he just loses his place in line and it's not abandonment, there is a reason to not want to leave -- right? -- while you have a valid, meaning timely, procedurally correct asylum application pending.

Why is that not different than somebody who applies for some kind of protection when they're clearly, under the law, in illegal status, which I think most of these cases faced? Right?

MS. MILLER: Right.

THE COURT: Here we're arguing about whether or not he's illegal. That's different; right? So why isn't it legally important that the reason we're arguing this is because he made a valid asylum

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application well before he became in overstay status?
Why isn't that different?

MS. MILLER: Are we talking about the defendant here or the hypothetical? The defendant is in removal proceedings right now. His asylum application has been found to not have merit. And then he reapplied, and that reapplication was found to not have merit, and so he was put into removal proceedings and is in removal proceedings right now. So, the first step to his asylum application is that it's not credible.

Only an immigration judge can grant him the lawful status. But I think that we're trying to thread the needle a little bit too closely here by saying the timing of the application is what decides whether you're here illegally or not. I don't think any court is saying that.

THE COURT: I think most of the courts refer a lot to the status of the individual.

MS. MILLER: And once you overstay, once
June 25, 2014, rolled around, even though he had an
application for asylum pending, he become illegally in
the United States for purposes of purchasing of a
firearm.

THE COURT: That's what you're arguing.

MS. MILLER: That's right. And that's what the cases say.

THE COURT: Why isn't it different? Because the courts that are making these decisions refer repeatedly to the fact the person is clearly illegal at the time the conduct occurred. And we here -- either I agree with you or I don't.

MS. MILLER: Right.

THE COURT: You need to tell me why it's not different that this gentleman made an appropriately timed request for asylum well before his overstay status.

MS. MILLER: Because the timing of his filing of asylum doesn't get us there. Doesn't get the defendant there. If we think about it, if you think about it from a policy perspective, let's say that we agree with the defendant for sake of this hypothetical, that the defendant's filing of asylum allowed him to remain in the United States and conferred status on him, some sort of legal status to be able to buy a firearm, and he goes and he buys a firearm at the War Store, and the firearms' dealer sells him that firearm, and then his application for asylum is denied. And by that denial, he suddenly becomes a person in possession of a firearm unlawfully

under 922(g)(5)(A).

So not only did he commit a crime without any notice that he had done that, that could not have been the intent, and the War Store dealer that sold him the firearm would also have committed a crime.

So it's the moment that that B2 visa expired that the defendant's status is illegally in the United States but lawfully present. He's allowed to remain.

And if we think about it in terms of, say, somebody who's here from Africa and is afraid of going back for fear of genital mutilation, we're not going to send that person back until the immigration judge has decided whether that application is valid or not, but that doesn't confer legal status for purposes of purchasing a firearm.

So, the person is, in many cases, tolerated or allowed to remain while that decision is finalized. So, if Mr. Horma's application is denied by the immigration judge, then for purposes of this hearing, he would be illegally here. That's not the way it can possibly work.

THE COURT: Well, you're saying it was okay in *Bazargan*. You're saying he become legal because the immigration judge said later he was -- isn't that what you're arguing with me about this case?

MS. MILLER: No, no. In Bazargan, I'm saying that Bazargan was in the same situation as the defendant here in this case.

THE COURT: Are you saying, though, his status is retroactive?

MS. MILLER: The status is not retroactive. The status is the status. I'm saying there is no change in status. That would have a bizarre result.

THE COURT: Wait, wait, wait, wait. With Bazargan, you just said to me -- I said all of these cases are folks who were illegal. And you said, "No, Bazargan is different because they said he became lawful in 1990." But before 1990 he would have been deemed unlawful because he violated the rules twice and admitted it.

MS. MILLER: Yes, he did. The judge found that he was illegal in 1990, but he admitted that he was illegally here prior to that. So if the defendant admits that he's illegally here, does that make him illegally here?

But I think the point I'm trying to make is this: I think that not a single one of the cases distinguishes between whether an application for asylum was filed before the expiration or after.

THE COURT: Of course, they didn't. That is

1 absolutely right.

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2 MS. MILLER: Right?

THE COURT: That's correct.

MS. MILLER: They don't distinguish that in Al Sabahi.

THE COURT: They didn't have to. They didn't face that issue that we have here.

MS. MILLER: There is no case that says a person who has filed an application becomes legally here for purposes of (g)(5)(A) because they filed an application, because if — the explanation that I just provided to the Court where he becomes — he can go legally buy a firearm because he filed an application for asylum? That hasn't been approved. That would mean that everybody could go —

THE COURT: I understand your argument.

MS. MILLER: Okay. So we talked about the Fourth Circuit in *Cavillo-Rojas* that the mere filing of an application for adjustment of status and receiving employment, the authorization card didn't legalize the alien's presence.

THE COURT: You're talking really fast again. Please slow down for my court reporter.

MS. MILLER: Okay.

And I would argue that the Bazargan court was

a pending application for asylum. And he gives no reason why and no legal authority to say why the pending application for asylum would be treated differently because there is no case out there because it's not treated differently. So I think that that would be the rationale on that, Your Honor.

The other last thing I wanted to mention with that is if Congress intended to exclude from 922(g)(5)(A) aliens who have merely filed for an application for adjustment of status, it would have said that. It would have said that you are illegally or unlawfully in the United States unless you have filed an application for a status and that application is pending. That's not in the law.

And, again, tolerating an alien's presence is quite different from legalizing an alien's presence.

I was going to talk about the transportation of unchecked cigarettes, if I may. It doesn't fall under the business practice exception, 921(a)(20)(A).

THE COURT: I've read that pretty carefully.

MS. MILLER: Okay. And I would just like to distinguish the *McLemore* case, if I may, and point out to the Court that the *McLemore* case that the defendant is relying on heavily for the idea that rollback of an odometer is somehow similar to smuggling cigarettes

into another state is that the court specifically stated in McLemore that the only reason why it found McLemore was subject to the exception under 922(a)(20)(A) is that the United States had charged him, McLemore, under 15 U.S.C., and the court said that 15 U.S.C. 1984 and 1990(c)(a) were meant to punish unfair trade practices. It falls under trade and commerce of the code. The court went on to say if he had been charged under Title 18, fraud, there would 10 not have been the exception.

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We talked about -- and if the Court would just like me to move on, I will -- that the cigarette smuggling is a tax that's levied.

THE COURT: I don't think we need to discuss that.

MS. MILLER: Okay. The void for vagueness argument under 921(a)(20)(A) and the Dimaya decision, I would just summarize for the Court, unless you want me to go into more detail, but Justice Kagan found that, in Dimaya, that the problem with 16's residual clause was that it had the same two features of ACCA and that those two features were that a judge had to imagine an ordinary case. It had the ordinary case requirement. And then on top of that, an ill-defined risk threshold. And it was those two that coalesced

to say that residual clause was void for vagueness.

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We don't have that here. Here we have the offenses pertaining to antitrust, unfair trade practices, and restraints of trade, all business offenses, clearly, or other similar offenses relating to the regulation of business practices. It's very clear.

And in the Stanko opinion, in a footnote, the court invokes the statutory interpretation canon ejusdem generis, which is Latin for "of the same kind," and it's used to interpret statutes when the law lists classes of persons or things. For example, if it refers to automobiles, trucks, tractors, motorcycles or other motor-powered vehicle, the court might use ejusdem generis to hold that it wouldn't include an airport.

And the Stanko court in response to the dissent, which the defendant asked you to rely on a dissent which is not joined by any other case, says even if we were to find ambiguity in the language of 921(a)(20)(A), as suggested by the defendant in that case, the application of the established maxim of statutory construction ejusdem generis would support our interpretation, the majority's interpretation.

So I would just conclude by saying that under

Dimaya, there is no uncertainty in the residual language.

THE COURT: You know, I'm aware of the statutory argument about it's known by its associates, about the law of the antecedent, and about the one you just cited.

MS. MILLER: Okay.

THE COURT: Stanko.

MS. MILLER: Did you want me to move to the next subject?

THE COURT: Yes, please.

MS. MILLER: Okay.

So I think the next item, if I'm not mistaken, is the Second Amendment argument. And we provided the Court with our brief, our subsequent briefing, where we discussed Heller and the application of Heller and the Chester analysis, and then, of course, talking about Carpio-Leon.

THE COURT: Are you talking about your sur-reply?

MS. MILLER: No, not in our sur-reply. In the -- the Court had ordered us to do some additional briefing after we filed *Carpio-Leon*. That's what I'm talking about.

THE COURT: Why don't you cite the ECF

number.

2 MS. MILLER: Okay.

THE COURT: You didn't seek permission to file your sur-reply, and so I don't know why I should consider it.

MS. MILLER: Well, okay. I know that the Court had already said that. I felt that if --

THE COURT: If you follow the rules and ask for it, then you can argue that.

MS. MILLER: Right.

THE COURT: But if you just file it, you can't argue it.

MS. MILLER: I'm not talking about the sur-reply, Your Honor.

THE COURT: Okay.

MS. MILLER: I'm not even addressing the sur-reply then. I am talking about the filing of docket entry 38, the government's supplemental statement.

THE COURT: All right.

MS. MILLER: And that's where we talked about the effect of the defendant's status on his challenge to 922(n) as violative of the Second Amendment. And we talked about -- we started with the Supreme Court's decision in *Heller*. And one of the important aspects

that we tried to point out is that the Supreme Court held in *Heller* that the Second Amendment does not permit an absolute prohibition on handguns held and used for self defense in the home. And that was *Heller* at 636.

The ban on handguns in Heller was found to be

THE COURT: I know what Heller holds. So why don't you just relate it to what we're arguing here.

MS. MILLER: Okay. So, then does the Court want me to skip *Chester* and *Carpio-Leon* and just talk about the Second Amendment?

THE COURT: I don't know why you're talking in that level of detail about Heller. Just tell me why you think Heller does or does not apply here.

MS. MILLER: Okay. Thank you.

So, in Heller, the Supreme Court said that a person who was lawfully permitted to purchase and keep a handgun in the home, under the regulation in Washington, D.C., he was not permitted to keep the -- to register to keep a firearm in his home and also had to keep it unloaded with a trigger lock. That is a complete ban on firearms in the home. Something that the Second Amendment protects.

In this case, this is a very limited

application of receipt of a firearm. And the key
here, I was reading through the defendant's brief, and
sometimes he talks about possession of a firearm in
terms of 922(n), and sometimes he talks about receipt
of a firearm, and it's not about possession of a
firearm.

And the distinction here for purposes of a Second Amendment analysis is, is a person who is, first, illegally in the United States even enjoying the extension of the Second Amendment rights to them? And the court in Carpio-Leon said no.

If we look then at what this statute does in terms of the Second Amendment, it requires a few things:

- (1) The person has to be under indictment.
- (2) The person has to know that they are under indictment. Fourth Circuit case law says they must know.
- (3) They had to have received that firearm after they were under indictment.

But if they lawfully possessed firearms prior to that, they are not required to turn those in under 922(n). They are simply not permitted to receive.

THE COURT: Or transfer.

MS. MILLER: Or transfer. In this case,

we're talking about receive. But, yes, receive or transfer a new firearm.

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So what is the reason for that? The reason for that is pretty clear, I think. It almost goes without saying.

THE COURT: Well, no, you have to say it.

MS. MILLER: I will say it. Okay.

The reason for that is that courts have held that people who are under indictment who are then acquiring firearms through either a receipt, a new receipt, can be viewed as having done that for a very suspicious or a nefarious purpose.

THE COURT: What courts say that?

MS. MILLER: I will tell you exactly what court said that. I believe that the court in -- if I could have just a moment.

So, in Salerno, the Supreme Court in Salerno, the court said no one doubts the goal of preventing armed mayhem is an important governmental objective. While this interest is heightened when the government musters convincing proof that the arrestee already indicted or held to answer for a serious crime presents a demonstrable danger to the community.

And then the Salerno court went on to say since the statute requires the defendant to know that

he has been indicted and thereafter knowingly receives
a gun, the government's interest is narrow and clear.

It would take a particularly brazen and dangerous
individual to engage in a gun transaction while
knowingly under a felony indictment.

The defendant talks about --

THE COURT: What case is that from?

MS. MILLER: Salerno, 481 U.S. at 750. The full citation is U.S. v. Salerno --

THE COURT: Wait. 481 U.S. --

MS. MILLER: 839. I'm sorry. It's referring to Skoien, 614 F.3d 638, and Salerno both.

THE COURT: So this goes to -- what is your definition of the public interest that's at issue here?

MS. MILLER: All right. I'll talk about that if I may have just a moment.

Thank you for indulging me while I located some of the notes that I wanted to talk about with regard to the government interest at stake.

So, as a general matter, the government's interest is preventing crime by indictees, and that is significant. And the risk of an erroneous deprivation is not there by putting additional procedures into place.

Here the idea is that the crime prevention -
I mean, we can look at the history of the crime act,

the Gun Control Act, beginning in 1961 going into the

Gun Control Act in 1968 and then 1986. And the

legislators when they were talking about that were

talking about an important governmental interest in

preventing crime.

And what we have here is a defendant who was an indictee. If we can use the defendant here just as an example for the important governmental interest, who is indicted for cigarette trafficking, and after he is indicted for cigarette trafficking, receives a gun, and then is charged with not only receiving a gun, but then later straw purchasing the gun. And we all know that cigarette trafficking is a high cash --

THE COURT: Right. So you're going farther into facts than you need to. My issue here is, first of all, where in your brief do you argue or state that the public interest protected is preventing crime by indictees?

MS. MILLER: I'm arguing that to you now.

THE COURT: Well, there's a test.

MS. MILLER: Right. It's the intermediate scrutiny test. And we said that in our brief, that intermediate scrutiny is the proper level of scrutiny

if he even gets there.

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THE COURT: I know. We're presuming he's there.

MS. MILLER: Presuming he gets there, intermediate level of scrutiny he fails because of the important government interest in keeping guns out of the hands of indictees who have been charged with a felony. It's not someone who's charged with a misdemeanor. Someone who's been charged with a felony, who, had they had a gun before that, would have been able to keep it, but to all of a sudden get a gun after indictment and before resolution of the case is a suspicious activity. And the important government interest is to keep guns out of the hands of people who may become involved in further criminal activity. So that is the important government interest.

And I would just also mention to the Court that intermediate scrutiny is appropriate also for a 922(n) as in the present case because, again, it's unlike the total ban in *Heller* that we talked about. 922(n) is only applied to a very narrow class of persons rather than the public at large.

So that would be another reason why I think intermediate scrutiny is appropriate and that it would

more than pass intermediate scrutiny.

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THE COURT: So, why don't you take me through the Fourth Circuit test about why it survives intermediate scrutiny.

MS. MILLER: Sure. So, in the Fourth
Circuit, and relying on *United States v. Chester*, in
Carpio-Leon said that the Second Amendment does not
guarantee the right for every person to possess every
type of weapon at every place by every person.

It said -- it noted that under Heller, the court noted that under Heller, the weight of the right to keep and bear arms depends not only on the purpose for which it's exercised but also on the relevant characteristics of the person invoking the right.

And under the *Chester* framework, the Fourth Circuit adopted the two-step approach, which many other courts have also used, and in *Kolbe v. Hogan* as well. And the first step is to assess whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.

And so what the court did in *Chester* is it examined the charge of a person who was in possession of a firearm while under -- who had been previously convicted of a crime of domestic violence. And the court, in *Chester*, said that the proper level of

scrutiny for that was intermediate scrutiny.

I think it's obvious that --

THE COURT: Presuming intermediate scrutiny.

MS. MILLER: Yes. I'm presuming intermediate scrutiny, Your Honor. And that is what we argued in our document 38 to the Court.

THE COURT: So what is the second step of the process, and why do you succeed? Well, the first step is whether or not the conduct falls within the scope of the Second Amendment.

MS. MILLER: Right. And then whether or not there's an important governmental interest, which I think we talked about for intermediate scrutiny and whether or not it survives that.

THE COURT: Well, so, what does Chester -Mr. Wagner argued that you didn't provide any basis.
The government bears the burden of proof; right?

Chester says what you might rely on.

MS. MILLER: Uh-huh.

THE COURT: Both Chester and Carter talk about the opportunity to present evidence, statistics, and other things.

MS. MILLER: Right.

THE COURT: Both at some point involve remands because there was not that record in front of

the District Court. So where have you provided this Court the information to show that the means and the ends, presuming intermediate scrutiny, and the nature of the -- you've made it clear that it's a limited burden on Second Amendment rights.

MS. MILLER: Right.

THE COURT: So given that it's a limited burden, what do I have to make a finding that bears your burden that there's a rational fit?

MS. MILLER: So, there's a couple of things,

Your Honor, that I would point out. And I think -- I

don't know that the Court wants me to go into all this

historical information regarding --

THE COURT: Is it in your briefing?

MR. WAGNER: It's in my oral argument today.

THE COURT: So, no, it's not in your briefing.

MS. MILLER: I mean, I think what our position was, and if I could have a moment, I'll look at it and see. I think we do talk about intermediate scrutiny in our original brief here.

THE COURT: Yeah, I'm presuming intermediate scrutiny. But the thing is, you bear the burden of the irrational fit under intermediate scrutiny. You still have to show why the fit is rational.

So, Mr. Wagner just argued it's not rational.

It's basically random. He's arguing something

different altogether, that it's an absolute and

complete ban on the group of folks who are indicted.

So, he's saying it's unconstitutional for that reason.

MS. MILLER: Right.

THE COURT: But even if we take your argument

THE COURT: But even if we take your argument that says that it's not -- that it is narrow. It is more narrow than an absolute ban. What do I have that says that there is a reason that the fit is rational, that where they got as far as narrowing it is a rational fit?

MS. MILLER: Sure. Okay. So, if I could have just a moment, Your Honor.

THE COURT: I'm sorry. Reasonable fit. I keep saying "rational fit."

MS. MILLER: I understand.

THE COURT: My clerk has to take care of me. It's not rational basis. It is a reasonable fit.

MS. MILLER: Right. And a reasonable not a perfect fit.

In Heller, the court talked about intermediate scrutiny as being perhaps the proper approach to some Second Amendment claims, not a complete ban on the Second Amendment, but some of the

lesser restrictions as in 922(n). Obviously, they didn't talk about 922(n). And the court said that in adopting -- if I could have just a moment. Sorry.

So, I think we talked about -- I guess maybe I'm not really understanding what you're asking me to articulate to you about why it survives intermediate scrutiny beyond the fact that I pointed out, you know, the governmental interest in preventing crime, the Crime Control Act of 1968, the idea that Congress expanded and included --

THE COURT: Those are all things you're adding; right? That's not in your briefing; am I right?

MS. MILLER: I don't know if I talked about the Gun Control Act of 1968, but I did refer to the Laurent court's decision, which goes on for I think 65 pages that talks about the history of the Gun Control Act.

THE COURT: So, here's the issue: To make a determination about whether or not a fit is reasonable, it's a means and an ends.

MS. MILLER: Yes.

THE COURT: And so my question goes to not just the test, but the basis about why the narrowing is the appropriate narrowing.

So under Carter and under Chester, there were discussions, evidence, or the Fourth Circuit's concern about a lack of that. Carter also said that the United States may resort to a wide range of sources, such as legislative texts and history, empirical evidence, case law, and common sense.

And so I'm trying to have you meet the burden that the Fourth Circuit requires that you meet under the test they set forward. What you have not given me is empirical evidence, which is the first thing that Mr. Wagner argued. So I'm saying meet the test.

MS. MILLER: Okay. So, I think to meet that test I would have to talk about the 1968 Gun Control Act as described by the Supreme Court. And the Supreme Court talked about the 1968 act reflecting concern with keeping firearms out of the hands of categories of potentially irresponsible persons.

It broadly stated the principal purpose was to make it possible to keep firearms out of the hands of those not legally entitled to possess them. And it could be because of age or because of a criminal background or, in circumstances like this, because a person is under indictment.

And the act sought to combat violence and promote public safety. And I would point the Court to

a number of cases.

First, Huddleston v. United States. That's
415 U.S. 814 at 824 to 825. That the act sought to
combat violence and promote public safety is mentioned
in a Ninth Circuit case.

United States v. Pruner, P-r-u-n-e-r. That's 606 F.2d 871 at 874. It's a Ninth Circuit 1979 case.

And then I would point to the congressional record quoting it's not the purpose of this title -- we're talking about the Gun Control Act -- to place any undue or unnecessary federal restrictions or burdens on law-abiding citizens. Then it talks about the different things that law-abiding citizens might do; hunting, trapshooting, personal protection.

It goes on to say, "This title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." And that is at S.Rep. No. 1501, 90th Congress --

THE COURT: You're talking way too fast, and you're looking down while you're reading it.

MS. MILLER: I'm reading the cite.

THE COURT: I can't hear you is the issue.

MS. MILLER: Okay. It's at S.Rep No. 1501, 90th Congress, 2d Session, 22 (1968).

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And then I think I can also point out to the Court as additional evidence for the Court's consideration is the 1986 revision to the statute.

There was a statute that was 922(g)(1) and (h)(1).

And both of those restricted the possession of a firearm. It wasn't just the receipt.
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And then in 1986, more than 30 years ago,

Congress revised the statute that dealt with indictees into a single statute, 922(n). And I can refer the

Court in a second to the cite for that, but Congress found that the right of citizens to keep and bear arms under the Second Amendment, an assurance of due process of law, required additional legislation to correct existing firearms' statutes and enforcement policies.

And, again, Congress reaffirmed its intent in the 1986 revisions not to discourage or eliminate private ownership or use of firearms by law-abiding citizens for lawful purposes.

And then subsequent amendments to 922(n) have not changed the language of 922(n), which deals, as this Court is well aware, with receipt and transfer but not possession.

THE COURT: I'm sorry, Ms. Miller. What are you referring to there?

MS. MILLER: Oh, in the 1968 provisions?

2 THE COURT: Yes.

MS. MILLER: I'm sorry. The 1986 provisions? Yes. So, when I talked about the 1986 revision to the statute where they came together again, that would be Firearms Owners' Protection Act. And then here's the cite. It's Pub.L. 99-308, 100 Stat 449 (1986).

I'll go back and repeat that. It's Firearms
Owners' Protection Act, Pub.L. 99-308, 100 Stat 449
(1986).

THE COURT: Is that something you briefed in front of me or you're just arguing that now?

MS. MILLER: You asked me about some additional -- one of the things we can consider is common sense, which I haven't talked about that yet, but also the congressional record is important. And I mentioned to the Court that this is laid out significantly in a case that I did cite for the Court in our original brief, which was --

THE COURT: Laurent.

MS. MILLER: Yes, Laurent.

THE COURT: All right. It's been a little over an hour and a half, which is normally my breaking point. And so I'm going to give all of us a 15-minute break. And I'm going to ask you, Ms. Miller, if you

have anything more to say, that you get it ready so
that it's concise and to the point, and then I'll
allow you to respond, Mr. Wagner, so we can keep
moving because we are hitting close to five o'clock,
which, given a 2:00 start time, I didn't imagine we
were going to do.

So we'll take a 15-minute break and be back at five o'clock.

MS. MILLER: Okay. Thank you.

(Recess taken.)

THE COURT: So here's my suggestion, Ms.

Miller. If you want to take another five minutes or so, you may do so. And then we can allow Mr. Wagner an opportunity to respond.

I'm going to ask you, and you can either do it now or you can ask your folks at your counsel table with you, we are struggling to find the case that you quoted from.

MS. MILLER: Okay. Which one?

THE COURT: The one that you first said was $Salerno \ \mbox{and then said it was} \ Skoien.$

MS. MILLER: Oh, sure. I'll find that for you.

MR. WAGNER: I've got them right here, Judge.

THE COURT: You have the cases?

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1 MR. WAGNER: I do.
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THE COURT: Is the language in it? We can't find the language in it.

MR. WAGNER: I haven't gotten that deep into the cases as to be able to determine whether the language is in there, but I have the cases.

MS. MILLER: Your Honor, I'll find that for the Court.

THE COURT: The computer is not finding that language.

MS. MILLER: Well, I have it cited, so I think it's got to be in there or maybe it was a, you know, reference to a different case above it, but I'll find it, where it talks about that.

THE COURT: I believe there is a case that talks about that. That's my issue. I have no doubt you're not quoting something that doesn't exist. I'm not sure it exists where you're suggesting it does.

MS. MILLER: You're talking about in the intermediate scrutiny analysis; correct?

THE COURT: I was talking about your quote that said "preventing armed mayhem is heightened when an arrestee presents a demonstrable danger to the community."

MS. MILLER: Right. I'll find that for the

Court.

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THE COURT: And the language was the actions are particularly brazen when someone receives a gun while knowing they are under indictment.

MS. MILLER: I don't think that was in there. I think preventing the armed mayhem is what I was talk about, Your Honor. I don't think I was quoting that second part. I don't have my argument in front of me at the moment, but I'll look and see exactly where that was from, and I'll cite to it before we leave today.

Your Honor, I don't even think I need five minutes if the Court doesn't have any questions about the other issues that were raised, but I do want to just briefly reiterate that the Al Sabahi court talked about the federal regulations that recognize that aliens illegally or lawfully in the United States include nonimmigrants whose authorized period of stay has expired. And an alien who is only permitted to remain in the United States for the duration of his or her status becomes illegally or unlawfully in the United States for purposes of 922(g)(5)(A) upon commission of a status violation, which is the expiration of the visa.

THE COURT: I understand that part of your

argument very well.

MS. MILLER: Okay. Very good. Thank you.

THE COURT: My question was about how you met the burden of intermediate scrutiny. So, if you want to add anything to that, you may do so.

MS. MILLER: I don't think I need to add anything to that unless the Court feels that I haven't addressed it fully.

THE COURT: You can address it however you wish. It's your burden. So either you've said everything you want to say or you haven't. You have the burden.

MS. MILLER: I have said everything I want to say. I would only note for the Court that the United States did talk about intermediate scrutiny.

THE COURT: I know you cited intermediate scrutiny. I am presuming intermediate scrutiny. I am talking about what *Carter* says you may rely on to establish the reasonable fit.

MS. MILLER: Right.

THE COURT: So, intermediate scrutiny is the standard of review, and then you have to meet the test.

MS. MILLER: Right. So, I would just add for the Court then, all of the courts that have looked at

the Second Amendment issue in terms of 922(n) have found that intermediate scrutiny is the appropriate level of scrutiny.

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The congressional record shows that the reason for the existence of the statute is the safety of the community and the inherent or enhanced danger of somebody who is under felony indictment for a crime, and the common sense approach would say that the very limited period of time that somebody is not permitted to acquire a new firearm is there because it is not disarming somebody who has firearms legally in their home prior to indictment.

So the common sense approach would be that the person who is acquiring a firearm only after indictment and only for a fairly short duration of time, that is while the indictment is being reviewed and finalized either by way of a plea, dismissal, or guilty verdict in a trial, is a fairly short period of time. And so the common sense is we don't want people who are indicted for felonies, serious felonies, to be able to go out and get a firearm.

THE COURT: So what about the transfer? How is that commonsensical? You could transfer one away. Why can't you do that?

MS. MILLER: So the transferring of a firearm

- is, for example, a person who is a felon under indictment transferring it to another person who may be a felon or --
- THE COURT: It may be a totally legal recipient of the firearm and he needs money for defense.

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Laurent --

- MS. MILLER: Right. So, for a person to transfer their firearm, you know, is not even the issue we have before the Court today.
- 10 | THE COURT: It's a constitutional challenge.
 - MS. MILLER: It's a constitutional challenge to 922(n) that no court has invalidated since hearing any of the arguments under the Second Amendment
- THE COURT: Well, maybe they had a different record.
- MS. MILLER: The record is that the person received a firearm while under indictment.
 - I thank you for your consideration, Your Honor. And we would ask that the defendant's motion be denied in its entirety.
- 22 THE COURT: All right. The mayhem language 23 is in the *Skoien* opinion.
- MS. MILLER: I think that's correct, Your
 Honor.

THE COURT: All right.

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MR. WAGNER: I will be brief, Your Honor.

Judge, on the issue of Mr. Horma being in this country illegally or unlawfully, the principal point we're trying to make here is that he was always here under an authorized period of stay. That's the critical factor that we ask the Court to look to.

Every other case, the Al Sabahi case, the Bazargan case, does not have those facts, Judge. And I don't really understand how it is that the government characterizes Bazargan the way they did before the Court, Judge.

In serval places in *Bazargan*, it's clear that before Mr. Bazargan obtained the weapon, he was not authorized to be in the United States. He was told by an INS official before he possessed the firearm, before he received the firearm, that he was here on an illegal status.

It was said by the judge in Bazargan that when he failed to comply with the conditions of the college of Mississippi State where he was going, he fell out of lawful status. He was no longer here as a lawful person.

So, Bazargan stands for exactly the proposition that we say it stands for, that

Mr. Bazargan fell out of lawful status, was not authorized to stay in the United States at the time he obtained the firearm. Our facts here are very different. And 27 C.F.R. 478.11 would support that position.

The government also talks about, as a policy matter, that we should find that Mr. Horma was here illegally and unlawfully. Judge, in these circumstances, we want to encourage people trying to enter our country, trying to get visas to our country, trying to get citizenship to our country, to go through the proper, lawful procedures in a timely manner. And that's exactly the facts we have in this case.

Mr. Horma came here on a visa. He applied for asylum while that visa was valid. Those are the procedures that we want people to follow to get lawful residence, to become residents and citizens of the United States. As a policy matter, it seems that that weighs in favor of finding that Mr. Horma was here lawfully and legally.

Judge, I just want to turn to the Heller argument, and I mistakenly said that was a Chicago case and not a D.C. case earlier. I was thinking about McDonald. I apologize for that misstatement.

But, again, we have a government's burden of proof, and the government has to show under an intermediate standard that there's a reasonable fit between the challenged regulation and a substantial government interest. The government has failed to present information sufficient to meet that the burden.

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Judge, indictees can possess firearms. It's just they can't receive firearms under the statute.

If an indictee is indicted for a business offense, he can receive or transfer a firearm. An indictee would have to go through a certain process for release in order to be in a position where he or she could receive a firearm. So there would be a certain amount of scrutiny that would be placed on that individual before they could be in a position to receive a firearm. That person has a presumption of innocence, Judge, when they're indicted for a crime.

We talk about in the cases, the Fourth

Circuit cases, and Heller, that the people that should

be precluded from possessing firearms are those who

are not law-abiding, responsible citizens. I don't

understand how the government can show here that

someone who is under indictment and can possess a

firearm is a law-abiding, responsible citizen, but

someone who is in that same category can't receive a

firearm. What is the danger? What is the increased danger in receiving or transferring a firearm when you are in the same status as someone who is permitted to possess a firearm?

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The government just stated that, generally speaking, someone is under indictment for a relatively short period of time. Well, that's not true universally, Judge. People are under indictment awaiting trial, awaiting to be adjudicated for a year, even two years in some state courts, even in some federal courts. So that's not necessarily the case when applying this universally.

And many indictees for felonies in the class of felonies where they are released on bond don't even face felony convictions. They're not even convicted of a felony. So the situation we have here, Judge, does not present sufficient evidence for the government to meet their standard, even under intermediate review. And we ask the Court to apply the strict scrutiny standard of review.

Judge, the government, in their brief, has relied on the *Call* case and the *Laurent* case. And in those cases, when the court, applying the intermediate standard, when the court found that this provision was constitutional, 922(n), the court turned on the

specific facts of those cases.

On the facts in *Laurent* that this person was charged with robbery, and the facts in *Call* when this person had a job that involved the transfer of firearms.

Judge, in this case, the government has produced no information that there's any specific danger here by Mr. Horma possessing a firearm. In Counts One and Three, it involves a firearm that was evidently received and possessed while he was at a shooting range, a very short period of time where he was alleged to have possessed or received a firearm. The second involved a firearm that was found in a dresser drawer, both Counts Two and Four, a dresser drawer of a residence where he was living.

So, Judge, neither of those situations would impute in this case the kind of dangerousness that would allow the government to meet its government, even understand the intermediate scrutiny standard.

Judge, this case is distinguishable. This case is unique. And we ask on its unique facts, under the law that's been presented to you, that Counts One through Four should be dismissed. Thank you.

THE COURT: Mr. Wagner, let me ask you this question.

MR. WAGNER: Yes, ma'am.

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THE COURT: In both Carter -- I'm going to give you the opportunity to answer this. In both Carter and Chester, cases were remanded because the government had failed to demonstrate evidence of the reasonable fit. And so if a court -- if you're arguing here that they have not submitted any evidence -- not just submitted evidence. I know that's not the only thing you argued. What should this Court do if there's a bad record and there are two Fourth Circuit cases that have remanded?

MR. WAGNER: Judge, you have given the government -- first of all, the government has the obligation, they have the burden of proof in this case, and they have not produced what I would consider to be sufficient evidence at this point.

THE COURT: I'm not saying they haven't, though.

MR. WAGNER: I understand that. My argument is that they have not. The Court has admonished the government that you need to produce whatever evidence you can to satisfy your burden.

Upon listening to that, they didn't even take the five minutes that you offered them just a moment ago to produce any such evidence.

And so, Judge, I think that any review of 1 2 this case, the appellate court would be satisfied that 3 you gave the government every opportunity to supplement the record, to provide what's required in 4 5 the record, to meet that standard, and they haven't done that, Judge. 6 7 THE COURT: Okay. All right. 8 So, obviously, it's now after five o'clock. 9 I presume that you all will get the exhibits together 10 and the stipulations as quickly as possible. 11 That can be done by when? Obviously, I 12 presume that -- Mr. Wagner, when can you do it? 13 MR. WAGNER: By Thursday, Your Honor? 14 THE COURT: Okay. 15 MR. WAGNER: If the Court requires it more 16 quickly, we could try to do that. 17 THE COURT: I want it to be accurate, so I'm 18 happy to give you the time that you need. And I 19 presume, obviously, you need to make sure that Mr. 20 Horma knows what's being submitted. 21 MR. WAGNER: Absolutely. 22 THE COURT: And so that appears to allow time 23 to do that.

Okay. Let me just take one minute.

(The Court is conferring with her law clerk.)

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1	THE COURT: All right. So we will anticipate
2	that the stipulations and the properly redacted
3	exhibits will be submitted by close of business, five
4	o'clock, on the record. And I will take the matters
5	under advisement. All right?
6	Thank you all very much. I apologize to
7	those I kept late.
8	(The proceedings were adjourned at 5:25 p.m.)
9	
10	I, Diane J. Daffron, certify that the foregoing is
11	a correct transcript from the record of proceedings
12	in the above-entitled matter.
13	/s/
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15	DIANE J. DAFFRON, RPR, CCR DATE
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